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IN THE COURT OF APPEAL OF THE STATE OF CALIFORNIA

FOURTH APPELLATE DISTRICT

DIVISION THREE

THE PEOPLE,

Plaintiff and Respondent,

v.

ANDY ROBERT PEREZ,

Defendant and Appellant.

G041095

(Super. Ct. No. 06CF3727)

O P I N I O N

Appeal from a judgment of the Superior Court of Orange County, Dan McNerney, Judge. Affirmed.

Douglas G. Benedon, under appointment by the Court of Appeal, for Defendant and Appellant.

Edmund G. Brown, Jr., Attorney General, Dane R. Gillette, Chief Assistant Attorney General, Gary W. Schons, Assistant Attorney General, Collette Cavalier and Vincent P. LaPietra, Deputy Attorneys General, for Plaintiff and Respondent.

A jury found Andy Robert Perez guilty of two counts of assault with a firearm, while personally armed with a firearm, one count of shooting at an occupied motor vehicle, and one count of impersonating an officer. The trial court sentenced Perez to 10 years and 8 months in prison. On appeal, Perez claims the court committed prejudicial error when it instructed the jury with Judicial Council of California Criminal Jury Instructions (2008) CALCRIM No. 372, the flight instruction. We find his contention lacks merit, and the judgment is affirmed.

FACTS

On a Saturday night in October 2006, Robert Kessler was driving, and Casey Siqueiros was a passenger, in Kessler's white Denali sports utility vehicle (SUV). As they traveled southbound on the 55 freeway in the City of Orange, a vehicle approached from behind flashing red and blue lights. Kessler, thinking the car was a police vehicle, pulled over. However, Siqueiros soon realized the car was not an official police vehicle, but rather a dark gray Chevy Tahoe, with tinted windows, 20-inch chrome wheels, and red and blue lights hanging from the rearview mirror. Kessler quickly used his cell phone to call 911, and he reported someone was impersonating a police officer. Kessler then pulled back onto the roadway and continued driving.

Kessler pulled over a second time in response to the Tahoe's lights, even though he knew the driver was impersonating a police officer. This time when he pulled back onto the roadway, Kessler attempted to follow the Tahoe and read its license plate number. During the subsequent chase, Siqueiros estimated the vehicles reached speeds of approximately 135 miles per hour. Kessler was angry as he followed the Tahoe onto the 22 freeway westbound, and then onto the 57 freeway northbound. When the driver of the Tahoe exited the freeway, Kessler followed and continued to trail the Tahoe on surface streets. The vehicles began by traveling southbound on Flower Street. However, after a few turns, Kessler lost sight of the Tahoe. He made a U-turn and started to head back towards Flower Street.

As Kessler's vehicle approached the intersection of Flower Street and Larkspur, Siqueiros heard some banging noises that he initially thought were firecrackers. Moments later they realized it was the sound of bullets hitting the car. Kessler accelerated and drove to a nearby liquor store where he called the police. When Kessler and Siqueiros got out of the car, they discovered two flat tires and three bullet holes in the passenger door.

Orange City Police Officer Aaron Drootin examined Kessler's vehicle and saw four bullet holes on the passenger side door, and a flat front right tire. He spoke with Kessler and Siqueiros regarding what had occurred, and they provided a description of the Tahoe. Officers closed off the area of Larkspur and Flower Streets and conducted a search. They recovered four 40-millimeter shell casings, a piece of metal, and a chain. The shell casings were consistent with a semi-automatic handgun. Billing records for Perez's cell phone on the night of the incident were consistent with a person travelling the route and at the time described by Siqueiros.

Desere Cristerna and her fiancé, Daniel Nickerson, rented a room in Perez's home at 2220 Larkspur, in the City of Orange, from June through the end of October 2006. Cristerna testified at some point prior to the night of the incident, Perez had received a package at the residence containing blue and red lights. Perez told Cristerna he used the lights to get people to pull off the highway and he would drive past them laughing. Perez also had shown Cristerna a pair of handguns that he kept in the house.

At approximately 10:30 p.m., on the night of the incident, Cristerna was in her room watching a movie when she heard someone run into the house past her room. She also heard a cell phone ring that she recognized as belonging to Perez. She then heard someone run again past her door. Shortly thereafter, she heard four to six gunshots. Initially, she just laid in her bed, but after a few moments, she looked out her window and saw one of her housemates, Vincent San Pedro, standing outside by the front door looking down the street. A few moments later, Perez knocked at her door. When

Cristerna opened the door she observed Perez was sweaty and out of breath, as if he had been running. He asked her to go get his truck from a business center near the house. Cristerna refused to leave the house because she had heard gunshots. Perez advised her not to worry. At that point, she observed Perez holding a black gun.

Cristerna then went to the front door and, as she did, Perez asked her to keep an eye out for a white SUV. When she walked outside and started down the street, she saw Perez's brother, Joe Perez (Joe), driving Perez's truck. When Cristerna went back into the house she again saw Perez, who had changed clothes and was now holding his baby in his arms. Cristerna informed him she had seen Joe driving Perez's truck. Perez said Joe was taking the truck to their other brother's Phillip's house.

Cristerna asked Perez what was going on, and he replied that he was driving down the freeway and pulled someone over using his red and blue lights. He zoomed past them, but they followed him. He tried to lose them on the freeway, and when that was unsuccessful, he got off the freeway and drove through little side streets to lose them. Ultimately, he parked his truck around the corner behind the dental office. Perez told Cristerna not to worry about it and not to say anything.

Cristerna then called a friend, Herbert Johnson, to come pick her up. Fearing Johnson would not be able to get down the street because of the police activity, she walked down the street. She encountered police officers who questioned her. She told police she had heard gunshots but gave them no additional information.

About two weeks later, Cristerna moved out of Perez's house and contacted the police. She told the police she had heard Perez telling his cousin in the living room something about the casings and shells. Cristerna denied her motivation to speak with the police was to help her brother who had recently been arrested for murder.

San Pedro testified the night of the incident he was at the house when Cristerna was home, and he never heard any gunshots. He also stated Perez was only at the house that night for about 15 to 20 minutes.

Joe testified he was home on the day of the incident and when Perez came home, he, Perez, and Perez's son went to Phillip's house. He denied ever driving his brother's truck. He never heard any talk of gunshots that night. When asked why he never contacted the police to tell them he and Perez were in the house together at the time of the incident, Joe said he did not work for the police. Joe had no explanation as to why he remembered, with particularity, what had happened on the night of the incident when nothing exceptional happened.

Johnson testified that on the night of the incident Cristerna changed her story several times. He said Cristerna said something about her brother being in trouble and she wanted to help him out. According to Johnson, Cristerna and her fiancé had been staying with him on the days prior to the incident and she had been using methamphetamine, marijuana, and methadone.

Perez testified on his own behalf regarding the events of the evening. He admitted he had used red and blue lights on the freeway to pull over other cars. He recounted on the night of the incident a white SUV had been harassing him and had cut him off. He responded by using his red and blue lights to get the white SUV to pull off the highway. Perez estimated his speed when he pulled the over the white SUV at approximately 60 to 65 miles per hour. Once the white SUV had pulled off the highway, Perez drove past it increasing his speed to approximately 80 to 85 miles per hour, and drove home. Once he reached home, he parked in the driveway. Perez did not notice anyone following him as he proceeded to his home.

After arriving home sometime after 10:00 p.m., Perez told his brother, Joe, who was at the house, he was going to Phillip's house. Perez told Joe to get ready if he wanted to come with him. As he waited for Joe, Perez spoke with San Pedro, who told him Cristerna heard gunshots. Perez testified he did not hear gunshots, nor did San Pedro. The only conversation Perez had with Cristerna was when she walked back into the house, and she told him there was police activity involving a white SUV at the liquor

store. Perez did not question Cristerna about the gunshots, because he did not find her credible based on misinformation she had given him in the past.

During the 10 to 15 minutes Perez was at home, his car was parked in the driveway. Perez denied having a gun in the house on the evening of the incident. When asked specifically whether he had ever fired a weapon at the white SUV, Perez adamantly denied doing so.

Perez was charged with two counts of attempted murder in violation of Penal Code sections 664, subdivision (a)¹ and 187, subdivision (a) (counts 1 and 2); two counts of assault with a semi-automatic firearm in violation of section 245, subdivision (b) (counts 3 and 4); one count of shooting at an occupied motor vehicle in violation of section 246 (count 5); and one count of impersonating an officer in violation of section 146a, subdivision (b) (count 6). It was also alleged that in the commission of the attempted murders, Perez personally discharged a firearm pursuant to section 12022.53, subdivision (c), and that within the meaning of sections 1192.7 and 667.5, Perez personally used a firearm. As to counts 3 and 4, it was alleged in the commission of these offenses, Perez used a firearm pursuant to sections 1192.7 and 667.5. The jury was unable to reach a verdict on the attempted murder counts (counts 1 and 2), but convicted him of the remaining counts and enhancements.

DISCUSSION

At trial, over Perez's objection, the court instructed the jury with the flight instruction (CALCRIM No. 372). The instruction advised the jury flight immediately after the crime was committed may show the defendant was aware of his guilt. If the jury concluded defendant fled, it was the jury's duty to decide the meaning and importance of that conduct. The instruction also cautioned the jury that evidence of flight cannot prove

¹ All further statutory references are to the Penal Code, unless otherwise indicated.

guilt by itself.² Perez’s sole contention on appeal is that the trial court committed prejudicial error by giving this instruction. We disagree.

Evidence of flight may show a consciousness of guilt. Section 1127c³ provides the court shall instruct the jury it may consider evidence of the defendant’s flight immediately after the commission of a crime in deciding guilt or innocence. The weight to which evidence of flight is entitled is a matter for the jury to determine. (§ 1127c.)

Perez and the Attorney General both rely on section 1127c but dispute whether there was sufficient evidence of flight to prompt the giving of CALCRIM No. 372. It is no surprise Perez argues no such evidence was introduced, and the Attorney General argues to the contrary. Perez asserts “a flight instruction should not be given where the evidence merely shows the defendant was arrested [several days] after the crime and miles away from the scene, since such evidence, standing alone, does not support an inference of guilt. (*People v. Watson* (1977) 75 Cal.App.3d 384, 403 [(*Watson*)).)” We do not disagree but fail to see how the *Watson* case relates to the facts here. It is not at all factually analogous. As we will explain, there was evidence of

² CALCRIM No. 372 provides: “If the defendant fled [or tried to flee] (immediately after the crime was committed/[or] after (he/she) was accused of committing the crime), that conduct may show that (he/she) was aware of (his/her) guilt. If you conclude that the defendant fled [or tried to flee], it is up to you to decide the meaning and importance of that conduct. However, evidence that the defendant fled [or tried to flee] cannot prove guilt by itself.”

³ Section 1127c provides in pertinent part: “In any criminal trial or proceeding where evidence of flight of a defendant is relied upon as tending to show guilt, the court shall instruct the jury substantially as follows: [¶] The flight of a person immediately after the commission of a crime, or after he is accused of a crime that has been committed, is not sufficient in itself to establish his guilt, but is a fact which, if proved, the jury may consider in deciding his guilt or innocence. The weight to which such circumstance is entitled is a matter for the jury to determine.”

conduct that the jury could reasonably have determined constituted flight and logically tended to support an inference of guilt.

Perez contends the evidence showed that after his encounter with the victim's SUV, Perez simply went home. Citing *People v. Bradford* (1997) 14 Cal.4th 1005, Perez argues returning home cannot be viewed as evidence of flight. We agree. In *Bradford*, our Supreme Court stated, “‘Mere return to familiar environs from the scene of an alleged crime does not warrant an inference of consciousness of guilt.’” (*Id.* at p. 1055.) But the court also explained circumstances of departure from the crime scene may warrant such an inference. (*Ibid.*) “[A] flight instruction is proper where the evidence shows that the defendant departed the crime scene under circumstances suggesting that his movement was motivated by a consciousness of guilt. [F]light requires neither the physical act of running nor the reaching of a far-away haven. Flight manifestly does require, however, a purpose to avoid being observed or arrested.” (*Ibid.*, internal quotation marks and citations omitted.)

The jury was instructed it should make the factual determination as to whether Perez had fled. The fact that after pulling over the white SUV on the freeway, Perez drove past and sped away from the scene is not contested. By his own admission, Perez drove away at an accelerated speed. It is also undisputed that after returning home, Perez stayed at the house for only 10 to 15 minutes before leaving to go to his brother Phillip's home. Perez's getaway from the scene on the freeway and his haste in leaving his home to go to his brother's house are both facts that would support a finding Perez fled and was not simply driving home.

Alternatively, Perez argues the court recognized the *only* count to which the flight instruction would apply was count 6, impersonating a police officer. He asserts that even if there was enough evidence to support giving the instruction with respect to this count, “any conceivable relevance was dispelled when [he] admitted guilt on that count. At that point, evidence of flight had no probative value.” He is wrong for several

reasons. We have reviewed the record and the trial court never made a final ruling holding count 6 was the only one to which the flight instruction applied. There was sufficient evidence of flight to warrant the instruction as to all the offenses. Perez returned home late at night after the shooting occurred. As stated above, Perez was only home for a few minutes before leaving with Joe to go to his brother's house. His quick departure was evidence of consciousness of guilt. It is well established that "the facts of each case determine whether it is reasonable to infer that flight shows consciousness of guilty." (*People v. Mason* (1991) 52 Cal.3d 909, 941.) Finally, we note Perez admitted impersonating a police officer, which suggests the jury would have undoubtedly found him guilty of that count regardless of the flight instruction. Under the facts of this case, we find the court did not err by instructing the jury with the flight instruction.

DISPOSITION

The judgment is affirmed.

O'LEARY, ACTING P. J.

WE CONCUR:

MOORE, J.

FYBEL, J.